DATE: April 7, 1992
CASE NO. 86-ERA-36

IN THE MATTER OF

RONALD J. GOLDSTEIN,

COMPLAINANT,

v.

EBASCO CONSTRUCTORS, INC.,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER

This case arises under Section 210, the employee protection provision, of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988). After a hearing on the merits, the Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R.D. and O.) finding that Respondent had discriminated against Complainant in violation of the ERA when it laid him off from his job working for Respondent at the South Texas Nuclear Project (STP) on April 11, 1986. Respondent is a subcontractor of Bechtel Construction, Inc., which is constructing the STP for its owner, Houston Lighting and Power Company. The ALJ also recommended that Respondent be ordered to pay Complainant back wages with interest from the date of his layoff until the date he is reinstated, to expunge certain documents from Complainant's record, and to pay Complainant compensatory damages of $20,000. In addition, the ALJ ordered Respondent to pay Complainant's costs and attorneys' fees, although he substantially reduced the amount claimed.

The Secretary issued a briefing schedule and both parties

[PAGE 2]
filed initial and reply briefs. Respondent excepted on two grounds to the conclusion of the ALJ that he had jurisdiction in this case, and Respondent asserts that the ALJ incorrectly applied the law on burdens of proof in ERA cases. Respondent also excepted to many of the ALJ's findings of fact and to his ultimate conclusion that Respondent violated the ERA. Finally,

Respondent excepted to the ALJ's recommended award of back wages and compensatory damages to the extent that the award exceeded the amounts contained in a stipulation of the parties. For the reasons discussed below, with the exception of back wages and compensatory damages, Respondent's exceptions are denied, and I adopt the conclusions of the ALJ and his recommended order. The ALJ's Recommended (R.S.D. and O.) Supplemental Decision and Order on attorneys' fees and costs is discussed separately below.

Some of the basic facts in this case are not in dispute. Respondent hired Complainant in February 1984 as a Craft Supervisor in the Instrumentation and Controls Department at the STP. Complainant was assigned to work in the Reactor Containment Building of Unit 1. [1] Complainant was transferred to the Unit 1 Diesel Generating Building in August 1985 where he continued to perform supervisory work. He was transferred to nonsupervisory office work in Unit 1 on October 14, 1985, and was transferred to similar work in Unit 2 on December 11, 1985. Complainant was transferred back to Unit 1 and assigned nonsupervisory office work in March 1986 when Respondent suspended its work on Unit 2. Complainant was laid off on April 11, 1986.

I. *Timeliness of Complainant's Request for Hearing*.

Respondent asserts that this case should be dismissed because Complainant did not make a timely request for a hearing after the investigation by the Wage and Hour Administration found no violation. 29 C.F.R. § 24.4(d)(2)(i) (1991). The Wage and Hour Administrator sent Complainant a notice of the results of the investigation dated June 16, 1986, which Complainant received on June 21, 1986. The regulation provides that the notice becomes the final order of the Secretary "unless within five calendar days of its receipt the complainant files with the Chief Administrative Law Judge a request by telegram for a hearing on the complaint." *Id*.

Complainant testified that he sent a telegram requesting a hearing to the Chief ALJ on June 24, 1986, and introduced a copy of a telegram written on a Western Union form, properly addressed to the Chief ALJ and stamp dated June 24, 1986. Complainant's Exhibit (C)-12. Complainant further testified that he gave this completed form to a clerk in the Western Union office in Las

---

[PAGE 3]

Vegas, Nevada, on June 24, 1986, and that the clerk stamp dated it, wrote the charges for sending it on the form, and gave Complainant a copy of the form with these additions. The original of the telegram is not in the record in this case, and Respondent argues that there is no proof that the Chief ALJ ever received the telegram.

The ALJ denied Respondent's motion to dismiss on this ground, finding that Complainant's testimony about sending the telegram together with the copy of the properly addressed, dated telegram proved that Complainant "substantially complied with [29 C.F.R.] § 24.4(d)(2)." R.D. and O. at 10. I agree. The correct addressing and mailing of a letter creates a presumption that it was received by the intended party. *In Re Carter*, 511 F.2d 1203, 1204 (9th Cir. 1975). Complainant has presented

enough evidence to prove that he sent the telegram within five calendar days of receiving the notice from the Wage and Hour Administration and to raise the presumption that his telegram was received by the Chief Administrative Law Judge. The fact that the record does not contain the original telegram is not sufficient to overcome Complainant's evidence that he complied with the regulation by sending (or filing) a request for a hearing by telegram within five days, or to rebut the presumption that the telegram was received by the Chief ALJ. I note that the ALJ case tracking system computer printout which accompanies the record shows that the case was docketed "06/24/86."

The requirement in the regulation that a copy of the request for hearing be sent to the Respondent does not include a time limit, so a reasonable time will be implied. Respondent did not assert that it did not receive notice of Complainant's request for hearing in sufficient time to prepare for trial and the record refutes any such contention. I find that notice to Respondent was reasonable.

II. *Internal Complaints as Protected Activity.*

Respondent points out that the United States Court of Appeals for the Fifth Circuit (the Circuit in which this case arises) has held that the ERA does not protect an employee who makes internal quality or safety complaints to his employer. *Brown & Root, Inc. v. Donovan*, 747 F. 2d 1029, 1031-1036 (5th Cir. 1984). It is undisputed in this case that Complainant did not make any of his safety or quality complaints to any government agency. [2]

I note that the other circuits which have considered this question have held, either explicitly or implicitly, that internal complaints are protected under the ERA. *See Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989) (implicit); *Kansas Gas &*

[PAGE 4]
Electric Co. v. Brock, 780 F.2d 1505, 1513 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986) (explicit); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984) (explicit); *Consolidated Edison Co. of New York v. Donovan*, 673 F.2d 61 (2d Cir. 1982) (implicit). I continue to be persuaded that reporting violations of the ERA internally to one's employer is a protected activity and that *Mackowiak* and *Kansas Gas and Electric*, rather than *Brown & Root*, set forth the appropriate resolution of this issue. For the reasons set forth below, I respectfully decline to follow the Fifth Circuit's decision in *Brown & Root*.

The legislative history of Section 210 of the ERA, states that the section "is substantially identical to provisions in the Clean Air Act and the Federal Water Pollution Control Act. The legislative history of *those acts* indicated that such provisions were patterned after the National Labor Management Act [sic] and a similar provision in Pub. L. No. 91-173 [the Coal Mine Health and Safety Act of 1969 (CMHSA), 30 U.S.C. § 801 et seq. (1976)]". S. Rep. No. 848, 95th Cong., 2d Sess. 29, *reprinted in* 1978 U.S. Code Cong. & Admin3.

News 7303 (emphasis added). It seems clear that Congress intended all of these laws to be interpreted in a parallel manner. *See Poulos v. Ambassador Fuel Oil Co.*, No. 86-CAA-1, Dec. and Order of Remand of the Secretary (Remand Order), slip op. at 5-7 (Apr. 27, 1987).

The comparable provision in the Coal Mine Health and Safety Act, which was narrower on its face than Section 210, was interpreted to protect miners who report safety problems internally. *Phillips v. Interior Board of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 938 (1975). *Phillips* was decided before ERA Section 210 was enacted and before the Coal Mine Health and Safety Act was amended to add language explicitly protecting internal safety reports. 30 U.S.C. § 815(c) (1988). At the time of the drafting of the Committee Report stating that Section 210 was patterned after the 1969 CMHSA, Congress had explicitly approved and adopted the *Phillips* interpretation as the correct interpretation of the 1969 CMHSA. Indeed, the same Congress that enacted Section 210, amended the 1969 CMHSA to clarify expressly its approval of *Phillips* as properly interpreting existing law. S. Rep. 181, 95th Cong., 1st Sess. 36, *reprinted in* 1977 U.S. Code Cong. & Admin. News 3401, 3436, (explaining that amending the 1969 CMHSA to include internal complaints expressly is "intend[ed] to insure the continuing vitality of the various judicial interpretations of the [1969 Act] . . ., e.g., *Phillips v. IBMA*, 500 F.2d 772; *Munsey v. Morton*, 507 F.2d 1202.") Congress's patterning of Section 210 on the 1969 CMHSA, and its express approval of *Phillips* as the correct interpretation of

---

that Act, makes clear that Section 210 is to be interpreted in accordance with *Phillips*. *See Cannon v. University of Chicago*, 441 U.S. 677, 696-701 (1979); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979).

Moreover, the National Labor Relations Act, one of the other models for ERA Section 210, often had been interpreted broadly by both the courts and the National Labor Relations Board in a variety of circumstances to protect employees who had not been in contact with a governmental entity. Thus, the Board has held that merely threatening to go to the NLRB is protected. *See First National Bank & Trust Co. and Darlene M. Snyder*, 1974 CCH NLRB ¶ 26,231; *Austell Box Board Corp. and Truckdrivers and Helpers Local Union No. 728*, 1980 CCH NLRB ¶ 17,002; *Orkin Exterminating Co., Inc. and Tony C. Allen*, 270 NLRB No. 75 (1984); *Midtown Service Center and James W. Wagner*, 271 NLRB No. 170 (1984). The United States Court of Appeals for the Sixth Circuit has held that an employee's refusal to testify falsely for an employer in an NLRB hearing is protected conduct, although the employee did not appear or participate in the hearing and never spoke to an agent of the Board. *NLRB v. Retail Store Employees Union, Local 876*, 570 F.2d 586, 590, 591 (1978), *cert. denied*, 439 U.S. 819 (1978). The Fifth Circuit itself has held that an employee who appears at an NLRB hearing but does not testify is protected. *NLRB v. Dal-Tex Optical*

Co., 310 F.2d 58, 62 (1962).

The courts also have interpreted the employee protection provisions of other labor laws broadly to protect internal complainants and former employees. *Love v. Re/Max of America, Inc.*, 738 F.2d 383, 387 (10th Cir. 1984) ("The [FLSA employee protection provision] applies to the unofficial assertion of rights through complaints at work."); *Marshall v. Parking Co. of America Denver, Inc.*, 670 F.2d 141, 143 (10th Cir. 1982) (refusing to release backpay claim after Wage and Hour investigation is protected, even though employee never spoke to government investigator); *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139, 142-147 (6th Cir. 1977) (former employee given bad reference by former employer is protected under section 15(a)(3) of Fair Labor Standards Act, even though section says "[i]t shall be unlawful . . . to discharge or discriminate against any *employee* . . . ."") (emphasis added); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1165 (10th Cir. 1977) (former employee is protected under section 704(a) of Title VII of the Civil Rights Act of 1964 although that section on its face protects only employees and applicants); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975) (refusal to endorse back-wage check back to employer after government ordered payment of back wages is protected, even though employee never contacted

---

[PAGE 6]

government investigator); *Smith v. Columbus Metropolitan Housing Authority*, 443 F. Supp. 61, 64 (S.D. Ohio 1977) (section 704(a) of Title VII of the Civil Rights Act of 1964 protects an otherwise uninvolved employee who refuses to cooperate in employer's defense of race discrimination charge). *See also Daniel v. Winn-Dixie of Atlanta, Inc.*, 611 F. Supp. 57, 59-63 (N.D. Ga. 1985); *Legutko v. Local 816, International Brotherhood of Teamsters*, 606 F. Supp. 352, 358 (E.D. N.Y. 1985); *Hayes v. McIntosh*, 604 F. Supp. 10, 16-18 (N.D. Ind. 1984); *Poulos v. Ambassador Fuel Oil Co.*, No. 86-CAA-1, Remand Order, slip op. at 10-11.

I recognize that Administrative agencies are bound to follow the law of the circuit in which a case arises, conflicting decision of other circuits notwithstanding, unless and until the Supreme Court resolves the conflict. The Supreme Court has denied a petition by an employer for a writ of certiorari to the Tenth Circuit to review the question of whether internal complaints are protected under the ERA, thus leaving standing a decision by that Circuit sustaining the Secretary of Labor's holding that internal complaints are protected. *Kansas Gas & Electric v. Brock*, 780 F.2d 1505 (1985), *cert. denied*, 478 U.S. 1011 (1986).

With deference to the Court of Appeals for the Fifth Circuit and due respect for its authority, I believe that the Fifth Circuit should be given another opportunity to consider whether internal complaints are protected, in light of the Tenth Circuit's more recent decision and based upon full exposition of the legislative history of the statutes as discussed above. For purposes of this case, I hold that Complainant engaged in protected activity when he made internal safety and quality complaints.

III. *Burdens of Proof*.

Respondent excepts to the ALJ's application of the principles governing burdens of proof and burdens of production set forth by the Secretary in *Dartey v. Zack Company of Chicago*, Case No. 82-ERA-2, Sec. Dec. (Apr. 25, 1983). Respondent objects that the ALJ included in his statement of the elements of a *prima facie* case that Respondent "discriminated" against Complainant (R.D. and O. at 10), rather than that Respondent took "adverse action" against Complainant. Later in the decision, the ALJ correctly stated the last element of Complainant's burden of production when he found that Complainant "has met his burden of raising the inference that his protected activity was the likely reason for the layoff." *Id*. at 12.

[PAGE 7]

In any event, I find that Complainant has met his burden of producing evidence sufficient to raise the inference that retaliation was a motivating factor in Respondent's decision to lay him off. Complainant engaged in several protected activities from June to August 1985, including: notifying management that "B" shift workers had skipped a "hold point" and altered a pipe without following proper safety inspection procedures; that "B" shift damaged a piece of equipment called a "flux mapping skid;" and that Complainant's supervisor did not follow a requirement to submit "control" documents at the end of each shift. R.D and O. at 3. Complainant also filed complaints with Respondent's Quality Assurance Department and with SAFETEAM. *See* note 2 above. Complainant was given a poor performance evaluation in March 1986, R-38, and laid off in April. R-39; R.D. and O. at 6. The poor evaluation and layoff followed Complainant's protected activities with sufficient "temporal proximity" to raise an inference of discrimination and to establish a *prima facie* case. *Couty v. Dole*, 886 F.2d at 148.

Respondent does not quarrel with the ALJ's findings that Respondent has met its burden of production by articulating legitimate business reasons for selecting Complainant for layoff, and that Complainant has not shown that those reasons were pretextual. R.D. and O. at 12. Respondent challenges the ALJ's conclusion, however, that "[t]he evidence . . . strongly suggests that [Complainant's] complaints about quality motivated retaliation." *Id*. Respondent argues there must be a finding that Complainant has proved by a preponderance of the evidence that retaliation was a motivating factor in the employer's action. Finding that the evidence "strongly suggests" this conclusion, Respondent contends, is not enough. But in the same paragraph, the ALJ explicitly held that "[Complainant] *has* shown that [Respondent] also was motivated by his filing of the quality complaints, or that [Respondent] had dual motives." *Id*. (emphasis in original). Thus the ALJ did place the burden on Complainant to prove, and found, that retaliation was a motive underlying his layoff. I also find that the ALJ correctly

applied the dual motive analysis of *Dartey v. Zack Company of Chicago*. [3]

IV. *Dual Motive*.

The ALJ held that "[Complainant] has shown that there was retaliation, by way of the final evaluation [of Complainant's performance] and layoff, motivated, at least in part, by his engagement in protected activity," and that "[Respondent] did *not*, by a preponderance of the evidence, prove that it would have laid off [Complainant] even in the absence of the protected conduct." R.D. and O. at 12 (emphasis in original). Respondent

---

challenges many of the ALJ's findings and inferences based on the record, as well as this ultimate conclusion. [4]

The key to the ALJ's findings and conclusions was his evaluation of the credibility of the witnesses. For example, the ALJ found that Rick Greenwell, the supervisor who gave Complainant the low performance evaluations leading directly to his layoff, was "inadequate in his explanations of his motives for actions taken against [Complainant]." R.D. and O. at 6. The ALJ also noted that Greenwell never consulted with Paul Plociennik, who was Complainant's supervisor for the four months prior to Greenwell's poor performance evaluation of Complainant. Plociennik had given Complainant a satisfactory performance evaluation during that time which was "considerably higher than evaluations prepared by Greenwell." R.D. and O. at 9. *See also* the ALJ's evaluation of the internal consistency of Alfred Kutowy's testimony with respect to the significance of Complainant's safety and quality complaints, R.D. and O. at 4; the ALJ's finding that Charles Jones, whose testimony supported Complainant's version of events, "testified throughout in a forthright manner," *id.* at 8. [5]

I am, of course, not bound by the credibility determinations of the ALJ, although they are entitled to the weight which "in reason and in the light of judicial experience they deserve." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 496 (1951). The ALJ's findings must be considered in light of "the consistency and inherent probability of testimony." *Id.* The entire record in this case has been reviewed, and I find that it supports the ALJ's findings and conclusions.

In addition to the ALJ's explicit findings of fact, there is one fact which lends further support to the ALJ's conclusions and on which he did not explicitly rely. Complainant was relieved of supervisory duties on October 14, 1985, and never again given any supervisory responsibility up to the time of his layoff. His duties for six months prior to his layoff involved paperwork in an office. Respondent did not explain why Complainant was "force ranked," or comparatively evaluated, with the other supervisors in the Instrumentation and Controls Department for purposes of selecting two supervisors for layoff, when he did not hold a supervisory position. [6] In addition, Respondent did not show, as was its burden to do under *Dartey v. Zack Company*, that if it had made selections for layoff without taking the discriminatory evaluation by Greenwell into account, Complainant

would have been laid off anyway because other employees clearly were superior to him.

V. *Relief*.

Respondent excepted to the ALJ's award of back pay with interest and compensatory damages to the extent it exceeded the

---

[PAGE 9]

amounts provided for in a stipulation of the parties. On the last day of the hearing, counsel for Complainant stated on the record that "[i]n the event that [the ALJ] should rule in favor of Complainant, we have agreed to an amount of damages. . . . We have agreed that the back pay amount will run from April 11, 1986, the date of layoff, to September 15th, 1987, and it will be at the rate of pay at which Mr. Goldstein would have been paid had he continued with his employment at EBASCO minus those wages that he has earned since that time period . . . ." T. 1689. Complainant's counsel also stipulated that the compensatory damages to which Complainant was entitled were $4,314.00. T. 1690. The parties also agreed that, if the ALJ did not order Respondent to reinstate Complainant, he would be entitled to one year of "front pay". *Id*.

The ALJ said he could not accept the parties' stipulation in its entirety because the ERA requires the Secretary to reinstate the Complainant to the same or a substantially equivalent position, and because "front pay" is not authorized by the ERA. R.D. and O. at 13. The ALJ then awarded back pay from April 11, 1986, to the date of Complainant's reinstatement and compensatory damages of $20,000. *Id*. Complainant has asserted that the ALJ "was within his right" to reject the stipulation of the parties, without citing any authority for that proposition.

Contrary to this view, the Fifth Circuit has held a number of times that "[i]t is well settled that stipulations of fact fairly entered into are controlling and conclusive, and courts are bound to enforce them . . . ." *A. Duda & Sons Cooperative Association v. United States*, 504 F.2d 970, 975 (5th Cir. 1974). *See also Holiday Inns v. C.H. Alberding*, 683 F.2d 931, 935 (5th Cir. 1982); *Down v. American Employer's Insurance Co.*, 423 F.2d 1160, 1164-65 (5th Cir. 1970). *Accord Consolidated Grain and Barge Co. v. Archway Fleeting and Harbor Service, Inc.*, 712 F.2d 1287, 1289 (8th Cir. 1983) (a stipulation on damages is binding); *Fenex v. Finch*, 436 F.2d 831, 837 (8th Cir. 1971) ("[P]arties are bound by stipulations voluntarily made and . . . relief from such stipulations . . . is warranted only under exceptional circumstances.") Absent a provision in a stipulation which might be contrary to public policy, a stipulation, like a settlement, is a contract, and the parties should be held to their bargain. *Cf. Macktal v. Brown & Root, Inc.*, Case No. 86-ERA-23, Sec. Order Nov. 14, 1989, slip op. at 4-5, *rev'd on other grounds*, *Macktal v. Sec'y of Labor*, 923 F.2d 1150 (5th Cir. 1991). *Cf. Macktal*, 923 F.2d at 1157.

VI. *Attorneys' Fees*.

A Supplemental Briefing Schedule was issued on June 3, 1990, giving the parties an opportunity to submit briefs addressing the ALJ's Recommended Supplemental Decision and Order (R.S.D. and O.)

[PAGE 10]
awarding attorneys' fees and costs. The R.S.D. and O. and related record materials were not forwarded to the Secretary with the R.D. and O., but were only received in May and June 1990, respectively, and neither party addressed the attorneys' fees issue in their initial or reply briefs. Both parties now have filed briefs on attorneys' fees. [7]

Complainant's attorneys submitted a petition for attorneys' fees and costs to the ALJ requesting fees of $51,412.50 for 411.3 hours of attorney time at $125 an hour, $13,678.00 for 390.8 hours of paralegal time at $35 an hour, and $10,279.63 in other costs. [8] The ALJ awarded attorneys' fees and costs to Complainant, but substantially reduced the amounts for attorneys' fees and for paralegal costs. The ALJ recommended that the Secretary award fees and costs for 106.7 hours of attorney time at $65 an hour ($6,935.50), 34.5 hours of paralegal time at $35 an hour (,207.50), and substantially all of the other costs claimed ($9,981.00). R.S.D. and O. at 6-7.

The authority of the Secretary in reviewing a recommendation for the award of attorneys' fees and costs is the same as it is with respect to any other recommendation of an ALJ after a hearing under the ERA. The Secretary has "all the powers [she] would have in making the initial decision . . . ." 5 U.S.C. § 557(b). Nonetheless, it is appropriate here, as in some other areas, *see supra* at 9-10, to give considerable deference to the ALJ's findings.

Courts of appeals generally defer to the findings of trial courts on matters of fees and costs because

> an appellate court is not well situated to assess the course of litigation and the quality of counsel. The District Court judge, by contrast, closely monitors the litigation on a day-to-day basis . . . [and is] intimately familiar with the barrage of pleadings, memoranda, and documents filed, and he observed the proficiency of counsel in court.

Copeland v. Marshall, 641 F.2d 880, 901 (D.C. Cir. 1980). *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The Secretary and an ALJ stand in similar relative positions in assessing the reasonableness of requests for attorneys' fees. Accordingly, although I do not adopt the highly deferential abuse of discretion standard applied by most federal courts of appeals,

I will give considerable deference to an ALJ's findings, particularly in an area such as competence of counsel, because "[t]he trial court 'saw 'the attorneys' work first hand'. . . .'" *Mares v. Credit Bureau of Raton*, 801 F.2d 1197, 1201 (10th Cir. 1986).

The ERA provides that upon request, the Secretary shall

[PAGE 11]
award to a prevailing complainant "costs and expenses (including attorneys' . . . fees) *reasonably* incurred." 42 U.S.C. § 5851(b)(2)(B) (emphasis added). "The most useful starting

point for determining a reasonable fee," the Court said in *Hensley v. Eckerhart*, "is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." 461 U.S. at 433. This is sometimes referred to as the "lodestar." *Copeland v. Marshall*, 641 F.2d at 891. Here the ALJ reduced the number of hours requested for both attorney and paralegal time and the hourly rate requested for attorney time.

The ALJ found that this was a "relatively simple case" in terms of the legal concepts involved and reduced the hours for legal research accordingly. R.S.D. and O. at 2-3. I agree that this case turned on its facts and broke no new legal ground. The ALJ's most substantial reductions came in the areas of time spent in trial preparation and trial for Complainant's attorneys and their paralegals. The ALJ found that Complainant's lead counsel at the hearing was a "novice [with] limited trial experience." He evaluated her presentation of evidence and handling of witnesses as "serious[ly] flawed," R.S.D. and O. at 3, and stated that she had trouble meeting deadlines, communicating with opposing counsel, and keeping the ALJ informed. *Id.* [9]

The ALJ noted several specific examples of how lead counsel's inexperience led to the expenditure of nonproductive time in trial preparation and at trial. R.S.D. and O. at 3-4. The ALJ also found that co-counsel for Complainant, Mr. Richard Condit, had even less experience than lead counsel and that he was of little assistance at the hearing. *Id.* at 4. In addition, the ALJ found that both attorneys spent an "excessive" amount of time on post-trial work drafting briefs and preparing the fee petition.

Complainant's attorneys oppose the ALJ's findings in the R.S.D. and O. because the ALJ made substantial reductions "in broad categories of activities without giving reference to the number of hours for each category, or by referencing counsel's detailed Fee Petition. [The ALJ's] failure to offer any specific basis for his cuts is a strong indication of arbitrariness . . . ." Complainant's Brief Supporting in Part and Opposing in Part the Recommended Supplemental Decision and Order at 6.

I find, however, that the ALJ's reasons for his reductions in requested attorney hours were adequately explained. In *Mares v. Credit Bureau of Raton*, the district court had reduced requested hours for trial preparation by 77%, had granted all requested hours for the trial, and had rejected all requested hours for post-trial work. The district court's justification for these substantial reductions was that the case could have

---

been prepared in much less time by "a reasonably competent lawyer . . . ." 801 F.2d 1197, 1202. The court of appeals rejected the argument that the district court must identify and justify each disallowed hour and the hours allowed for each task. "Such a rule would lead to disagreements of the most odious sort between court and counsel," and would violate the Supreme Court's caution that a "request for attorney's fees should not result in a second major litigation." *Id.*, citing *Hensley v. Eckerhart*, 461 U.S. at 437. Reducing hours by categories of work to arrive at a "reasonable" number "is not an erroneous

method, so long as there is sufficient reason for its use." *Mares v. Credit Bureau of Raton*, 801 F.2d at 1203. In *Hensley*, for example, a one third reduction in the hours claimed for one attorney was approved "to account for his inexperience and failure to keep contemporaneous time records." 461 U.S. at 438 n.13. In *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 478 U.S. 546 (1986), the Court upheld reductions of 48 percent and 33 1/3 per cent for "unnecessary, unreasonable, or unproductive" time. 478 U.S. at 567.

The court held in *Mares v. Credit Bureau of Raton* that it was not error to refuse to isolate and analyze every hour for each task performed and state which were allowed and which denied. The general reductions made by the district court were supported by a review of the entire course of the case and a finding that, given the nature and circumstances of the case, too much time was claimed because of counsel's "inexperience." 801 F.2d at 1203. In addition, the court suggested that counsel should have exercised "billing judgment." [10] The ALJ's reductions for attorney time here were adequately explained in the R.S.D. and O. and I will not disturb them.

The ALJ recommended "draconian" reductions in time claimed for paralegal work because of "excessive 'digesting'" of documents and duplicative legal research. R.S.D. and O. at 5. He disallowed all of the hours claimed for one paralegal, Ms. Bauman, as a duplication of the work of the trial attorney, and substantially reduced the hours of the other paralegal, Ms. Shepard, as unnecessary and unreasonable. He allowed 34.5 paralegal hours out of 390.8 claimed.

The Supreme Court has observed that "encouraging the use of lower-cost paralegals rather than attorneys wherever possible . . . 'encourages cost-effective delivery of legal services . . . .'" *Missouri v. Jenkins*, 491 U.S. 274, 288 (1989) (citation omitted). Although I agree with the ALJ that some of the paralegal time appears excessive, I do not accept the ALJ's recommendation for reductions of this magnitude. Ms. Shepherd spent 150.5 hours digesting the 1700 page hearing transcript and one deposition of 105 pages. Almost a month to digest 1800 pages

---

certainly seems excessive. In addition, many hours were claimed for Ms. Shepherd's work "[o]rganiz[ing] digests into findings of fact" and "[p]repar[ing] findings of fact, conclusions of law, and brief." I agree with the ALJ that these hours are excessive and duplicative of what should have been attorney work. I will allow 80 hours for Ms. Shepherd. Virtually all of Ms. Bauman's work was digesting deposition transcripts which are not in the record, but for which I will allow 8 hours. [11]

The ALJ rejected the request of Complainant's attorneys for a rate of $125 an hour for attorney work. He found that the "limited experience and the poor quality of the representation" justified setting the rate at the lower end of the scale for associates in major Washington, D.C., law firms. R.S.D. and O. at 6. The ALJ also noted that Ms. Garde worked out of an office in Appleton, Wisconsin, which he thought would have been the more appropriate geographical area for determining the customary rate

for attorneys with her level of experience. *Blum v. Stenson*, 465 U.S. 886, 895 (1984) ("'[R]easonable fees are to be calculated according to the prevailing market rates in the relevant community . . . ." However, neither party submitted information on billing rates in the Appleton area.

I find the ALJ's decision to set the rate at $65 an hour was reasonable. The ALJ based this rate on a chart of rates for partners and associates in major District of Columbia law firms, derived from the Directory of the Legal Profession for 1984 and reproduced in Complainant's Petition for Attorney's Fees and Costs, page 5. [12] Because of the "limited experience and the poor quality of representation," R.S.D. and O. at 6, the ALJ decided to set the hourly rate "at the lower end of the scale for associates in the prestigious Washington, D.C. firms listed [in the above chart]." *Id.* The burden was on Complainant "to produce satisfactory evidence - in addition to the attorney's own affidavits - that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson*, 465 U.S. 886, 896 n.11. The ALJ found Complainant did not carry that burden with respect to the requested rate of $125 an hour. He concluded that the skill and experience demonstrated proved entitlement only to $65 an hour, the low end of the scale for associates in major Washington law firms, because Complainant's attorney was a "novice" with "limited trial experience." R.S.D. and O. at 3. Absent any substantial showing that the ALJ was mistaken in his evaluation of the level of skill and experience of Complainant's attorney, I sustain his determination on the applicable hourly rate.

Complainant's attorneys' request for an enhancement of the "lodestar" amount is denied. Although the governing test for

---

enhancement may be somewhat unclear at this time, Complainant has not shown he is entitled to an enhancement under any of the recent Supreme Court decisions on this issue. *See Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711, 734 (1987) (O'Connor, J., concurring); *Blum v. Stenson*, 465 U.S. 886, 899 (1984); and *see* analysis of plurality and concurring opinions in *Delaware Valley* in *King v. Palmer*, 950 F.2d 771, 777-85 (D.C. Cir. 1991).

Finally, after the fee petition was submitted to the ALJ, Complainant's attorney, Mr. Condit, [13] submitted a request for time spent on this case, including preparing briefs filed before me on both the R.D. and O. and the R.S.D. and O. Mr. Condit submitted an initial and a reply brief in support of the ALJ's R.D. and O., and a brief on the R.S.D. and O. The initial brief on the R.D. and O. was limited to an overview of the facts and a short discussion of each major point in support of the ALJ's R.D. and O. This approach appropriately kept the time expended in briefing the case to the Secretary to a minimum. The reply brief contained a refutation of Respondent's arguments asserting error by the ALJ in his application of the law to this case, and a fairly detailed analysis of the facts in support of the ALJ's findings of fact. The brief on the R.S.D. and O. was an appropriate effort, even though I did not find it entirely persuasive, to support the granting of attorneys' fees while

arguing that the ALJ's reductions were too severe. The time spent, 91.9 hours, in relation to the overall work product appears reasonable. Attached to this supplemental request for attorneys' fees is an article from the *National Law Journal* of November 30, 1989, entitled "Sampler of Rates Around the Country," listing billing rates for several large firms in Washington, D.C. I find it appropriate, therefore, to set the rate for this supplemental request for attorneys' fees at $85 an hour, the lower range of rates for associates in the Washington, D.C., area (which I find is the relevant market for work on filings before the Secretary on ALJ recommended decisions under the ERA) indicated in the *National Law Journal*. [14] The request for enhancement of these fees is denied for the same reason stated above for denial of the enhancement of fees for the ALJ hearing.

Respondent shall pay Complainant's attorneys' fees and costs [15] as follows:

- Attorney work before the ALJ:
  106.7 hours at $65/hour
  = $ 6,935.50;
- Paralegal work:
  88 hours at $35/hour
  = $ 3,080.00

[PAGE 15]

- Other costs claimed:
  = $ 9,981.00
- Attorney work after March 1988:
  91.9 hours at $85/hour
  = $ 7,811.50

Total: $27,808.00

VII. *Order*.

Accordingly, Respondent is ordered:

1) to reinstate Complainant to his former position or a substantially equivalent position with the same terms, benefits, conditions, and privileges he would have enjoyed if Respondent had not laid him off on April 11, 1986;

2) to pay Complainant back pay from April 11, 1986, to September 15, 1987, as provided in the parties' stipulation, T. 1689-90;

3) to pay Complainant compensatory damages of $4,314.00 as provided in the parties' stipulation, T.1690;

4) to expunge from its records the evaluations of Complainant by Mr. Greenwell upon which the April 1986 layoff was based;

5) to pay Complainant's attorneys' fees and costs as set forth above.

SO ORDERED.

LYNN MARTIN
Secretary of Labor

Washington, D.C.

OAA:DDRACHSLER:kg:02/19/96
ROOM S-4309:FPB:523-9728

[ENDNOTES]

[1] Apparently there are two separate nuclear reactors at STP with separate appurtenant buildings such as a Fuel Handling Building and a Diesel Generating Building for each.

[2] I do not adopt Complainant's argument that making complaints to the organization called SAFETEAM is equivalent to making complaints to the government for purposes of protected activity analysis under *Brown & Root.* Complainant's Initial Brief at 4-6. (SAFETEAM is an organization established by Houston Lighting and Power Company to receive and investigate allegations of safety and quality violations at STP.) The fact that SAFETEAM may have carried out its activities in a manner similar to government investigative agencies cannot transform a private organization, responsible only to a private corporation, into a government agency.

In addition, I do not rest my decision here on the ALJ's view that filing a complaint with SAFETEAM would constitute "commencing" or "causing to be commenced" a proceeding under the ERA which would meet the Fifth Circuit's test for protected activity. R.D. and O. at 11.

[3] I do not accept a requirement, as asserted by Respondent, that Complainant must prove that "but for" his protected activity, the adverse action would not have been taken. If the employee carries his burden of proving by a preponderance of the evidence that retaliation was a motivating factor in the adverse action, the employer has the burden of proving by a preponderance of the evidence that it would have taken that same action even if the employee had not engaged in any protected activity. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d at 1163-64. The Supreme Court affirmed its approval of the "even if" standard in the dual motive analysis in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) ("an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person.") (plurality opinion).

[4] Among other things, Respondent asserts that Complainant received performance evaluations by Mr. Greenwell that were lower than most of the other supervisors both before and after Complainant engaged in protected activity, which shows that the evaluations were not motivated by the protected activity. Respondent points to Complainant's complaint to the Ebasco Quality Assurance Department on August 13, 1985, as the first protected activity. But Complainant began raising complaints

about the competence of Mr. Parent and some workers on the B Shift under Mr. Parent's supervision in June 1985. Transcript of hearing (T.) 36-37; 52-53. These concerns were borne out by the findings of the Ebasco Quality Assurance Department. Ebasco QA found in its investigation of Complainant's concerns that "[i]n regards to B Shift Activities from March 1985 to August 1985 it appears that some of the hardware discrepancies and procedural violations noted resulted from the inadequate training and preparation of Ken Parent. . . . B Shift personnel were not adequately familiar with the program." Complainant's Exhibit 40, p. 4.

[5] Complainant was transferred to the Diesel Generating Building in August 1985, and transferred several times to nonsupervisory office work in October and December 1985 and March 1986. Although these adverse actions are not actionable because they occurred more than 30 days before he filed the complaint, they are some evidence of retaliatory intent in the poor performance evaluation and layoff which followed shortly thereafter.

[6] The only reference to this question in the record is Mr. Greenwell's comment in response to questions about why he filled out a field supervision checklist on Complainant between December 1985 and March 1986 when Complainant was not a supervisor at that time. Mr. Greenwell said "[t]hat's because he was in the construction budget, I guess you could say." T. 1181.

[7] Respondent urges the Secretary to deny Complainant's request for costs and attorney's fees in its entirety because the request was not filed within the time specified by the ALJ in the R.D. and O. The ALJ ruled in the R.S.D. and O. that Complainant's attorneys did make a timely submission of the petition for costs and attorneys' fees because the ALJ's order was not received by Complainant's lead counsel, Ms. Garde, at her office in Wisconsin. Ms. Garde requested additional time to submit the petition, which the ALJ granted. R.S.D. and O. at 1. There are no specific provisions, either in the regulations implementing
the ERA, 29 C.F.R. Part 24, or the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, governing time limits set by ALJs for submissions in cases pending before them. The ALJ did not abuse his discretion in accepting the Fee and Costs Petition here and Respondent has had ample opportunity to express its views on the subject.

[8] Complainant voluntarily reduced the number of hours claimed for paralegal work from the 576.2 purportedly shown by its records to 390.8. *See* Appendix A to Complainant's Petition for Attorney's Fees. Complainant also requested an upward adjustment of the so-called lodestar amount of $75,370.13 to $89,765.63. In addition, Complainant requests in his attorneys' fees brief an additional fee award of $11,487.50 for 91.9 hours spent preparing the merits brief before the Secretary and the brief on attorneys' fees. Finally, Complainant requests

that the latter amount should be enhanced to $14,704.00.

[9] The ALJ intimates that Complainant's counsel may not have been forthright about certain contacts she said she had made with opposing counsel. S.D. and O. at 3.

[10] In *Hensley v. Eckerhart*, the Court said "[c]ases may be overstaffed and the skill and experience of lawyers vary widely. Counsel . . . should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. 'In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority.' *Copeland v. Marshall*, 205 U.S. App. D.C. 390, 401, 641 F.2d 880, 891 . . . ." 461 U.S. at 434 (emphasis in original). Here, I would note, for example, that counsel claimed a number of 10, 12, 14, and 15 hour days. I have no doubt that counsel was in the office for that amount of time on each of those days, but exercise of billing judgement suggests not claiming that every minute of every hour was billable.

[11] In reducing the hours claimed for paralegal work, I have taken into account the court of appeals' comment in *Copeland v. Marshall* that "there may be more than one reasonable hourly rate . . . for each of the kinds of work [] involved in the litigation." 641 F.2d 880, 892. Here again, Complainant's attorneys should have exercised billing judgment, requesting considerably less than $35 an hour for digesting transcripts by paralegals. Rather than attempt to calculate costs for different hours worked at different rates, the reduction in hours for the paralegals takes this factor into account.

[12] The Fifth Circuit has indicated that the applicable "market rate" is the rate in the area where the case is tried. *Young v. Pierce* 822, F.2d 1376, 1378 (5th Cir. 1987); *see also Donnell v. United States*, 682 F.2d 240, 251 (D.C. Cir. 1982) ("the relevant community is the one in which the district court sits"). This case was tried in Houston, Texas, by an ALJ from the Department of Labor's Office of Administrative Law Judges regional office in San Francisco, but neither party submitted rates for either of those areas and Respondent did not object to use of Washington, D.C., rates. Respondent's Brief in Support of the Supplemental Recommended Order of Administrative Law Judge Brissenden at 5.

[13] Mr. Condit is in the Washington, D.C., office of the Government Accountability Project. Ms. Garde apparently performed no work on the case after the filing of the original fee petition.

[14] Respondent did not reply to Complainant's request for attorneys' fees for work on this case before the Secretary, although Respondent did file a Brief in Support of the Supplemental Decision and Order of [the ALJ] urging the Secretary

to adopt the ALJ's recommendation for reductions in the number of hours claimed and application of the lower hourly rate.

[15] Respondent shall not be liable, however, for those costs for which Complainant failed to provide records and documentation. S.D. and O. at 6.